UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, et al.,
Plaintiffs

vs

BOARD OF HAMILTON COUNTY COMMISSIONERS, et al.,
Defendants

Case No. 1:02-cv-107
Spiegel, J.
Litkovitz, M.J.

ORDER RE: REQUEST FOR REVIEW BY CLAYMON WOMACK

This matter is before the Court on the Request for Review of the denial of a Sewer Back Up ("SBU") claim by Claymon Womack. (Doc. 528). Mr. Womack seeks compensatory damages from the Metropolitan Sewer District of Greater Cincinnati ("MSD") for basement flooding on September 26, 2011.

Mr. Womack's request for review is filed under the Sewer Back Up[1] program (formerly known as the Water-in-Basement Claims Process Plan) (Doc. 131, Consent Decree, Exhibit 8). The Plan states in relevant part:

> Subject to the requirements of this Plan, occupants who incur damages as a result of the backup of wastewater into buildings due to inadequate capacity in MSD's Sewer System (both the combined and the sanitary portions) can recover those damages. This plan also provides a means for occupants to recover damages arising from backups that are the result of MSD's negligent maintenance, destruction, operation or upkeep of the Sewer System. The Claims Process is not intended to address water in buildings caused by overland flooding not emanating from MSD's Sewer Systems or caused by blockages in occupants' own lateral sewer lines.

(Doc. 131, Consent Decree, Exhibit 8 at 1). In determining the cause of SBU, MSD must exercise its good faith reasonable engineering judgment and consider the following non-

[1]The "Water-In-Basement" program has been renamed the "Sewer Back Up" program to more accurately reflect MSD's responsibility for sewage backups caused by inadequate capacity in MSD's sewer system. *See* Doc. 452 at 4; Doc. 454 at 16.

exclusive factors: amount of precipitation, property SBU history, condition of the sewer system in the neighborhood, results of a visual inspection of the neighborhood to look for signs of overland flooding, neighborhood SBU history, capacity of nearby public sewer lines, and topography. (Doc. 131, Consent Decree, Exhibit 8 at 2). Damages arising from basement backups for which MSD is responsible are limited to documented real and personal property. *Id.*

The Consent Decree also includes a Prevention Program designed to preclude the occurrence of building backups. (Doc. 131, Consent Decree, Exhibit 6). This program utilizes a variety of remedial measures to address sewer backup, such as installation of backflow preventers and grinder pump systems. *Id.* MSD will purchase and install, at its own cost, such devices where it is determined in MSD's reasonable engineering judgment that such devices are the appropriate solution to an eligible building backup situation. *Id.* The Magistrate Judge has jurisdiction to hear any matter in dispute between homeowners and the MSD arising from the Sewer Back Up program, including those involving prevention devices. (Doc. 509).

Mr. Womack is the resident of the property at 2211 Ripplebrook Drive, Cincinnati, Ohio. On October 31, 2011, MSD denied Mr. Hill's claim to recover damages resulting from a flooded basement during a rain event on September 26, 2011. MSD determined that the sewer backup incident on September 26, 2011 at 2211 Ripplebrook Drive was caused by the malfunction of the grinder pump previously installed at the property. (Doc. 528, attachment). MSD concluded that the pump was incapacitated by a t-shirt wrapped around the cutter of the pump, which caused the pump to fail. *Id.* MSD advised Mr. Womack that this was a violation of the Covenant and Agreement executed at the time MSD installed the pump, which requires the user of the property to not flush clothing. MSD concluded that it was therefore not responsible for the damages claimed.

Mr. Womack disputes MSD's contention that the pump failed because of a t-shirt or rag interfering with the pump's operation. Mr. Womack states that Winelco, the company MSD hired to install and service backflow prevention devices, came out to inspect the pump on the day of the rain event. Mr. Womack states that the representative replaced the pump in Mr. Womack's presence and Mr. Womack did not observe any debris or material in the pump. Mr. Womack alleges he was told that the pump's electrical system tripped because of a high amp draw, and not because of "a mysterious t-shirt or rag." (Doc. 528 at 2). Mr. Womack seeks damages in the amount of $13,383.66 for the loss of personal property.

MSD contends that it properly denied Mr. Womack's claim based on an investigation which showed the pump grinder failed as a result of debris in the cutter of the pump. (Doc. 542, Exhibit 1). MSD submits the original Covenant and Agreement regarding 2211 Ripplebrook which indicates that Mr. Womack is responsible for the daily use of the equipment installed at 2211 Ripplebrook, and that the property owner is bound by a release of claims contained in the same agreement. (Doc. 542, Exhibit 3).

At the hearing of this matter, Tom Fronk, an Engineering Technical Supervisor with MSD's Special Investigations Division, testified that when the Winelco technician performed the initial investigation of Mr. Womack's pump, he discovered there was too much water in the pump basin to inspect the grinder pump. The technician then installed an additional sump pump in the basin to drain the excess water from the basin. (*See also* Doc. 542, Work Authorization of 9/26/11). Once a sufficient amount of water was drained, the technician returned to the property and actually pulled the grinder pump from the basin. Upon inspection of the cutter portion of the grinder pump, the technician discovered t-shirt-like material bound up in the cutter which prevented the cutter from spinning. The Work Authorization states:

> Upon arrival basin still flooded. We changed out the breaker for a new one. We rewired up the pump and turned on. The breaker tripped so we pulled the pump. The pump had what looked to be a rag or part of a t-shirt bound up in the cutter along with a condom. We removed the cutter and pulled out all the debris. We reinstalled the cutter and tested the pump. The pump ran 9.6 amps out of the basin. We reinstalled the pump and tested the amps again. The pump tested 13.7 amps. We then tested the alarm. Everything now checks out ok.

(Doc. 542, Work Authorization of 9/26/11). Mr. Fronk testified that because the obstructed cutter blades drew additional amps from the electrical system, the safety mechanism included with the device caused the circuit breaker to trip. Once the technician removed the grinder pump and discovered debris in the cutter blades, he unbound the material from the blades and replaced the original pump back into the pump basin.

MSD further states that Winelco responded to 2211 Ripplebrook Drive another time in October 2011 and found a similar problem. Upon inspection of the Mr. Womack's grinder pump following an alarm event, the Winelco technician pulled the pump and "found some debris in cutter (could not tell what it was), removed debris, reinstalled the pump" and "also removed some grease and a couple of wet wipes." (Doc. 542, Work Authorization dated 10/21/11). Mr. Fronk testified that MSD paid $500.00 to Winelco for each of the September and October services.

MSD states that in November 2011, debris was again discovered in the pump. The pump was replaced at MSD's expense at a cost of $1,800.00.

Residents like Mr. Womack who seek review of the denial of an SBU claim bear the burden of proof of showing that the backup of wastewater into their property was due to inadequate capacity in MSD's sewer system. Here, MSD has presented evidence that any flooding of Mr. Womack's basement was not the result of a capacity-related problem with the main sewer line, but rather was caused by a malfunction in the grinder pump that was previously installed at the property by MSD. The Covenant and Agreement entered into at the time of the original installation of the grinder pump prohibits property owners from flushing clothing and other materials down the drain and requires them to maintain the system in good working order by following daily operation and use guidelines. (Doc. 542, Exhibit 3 at 4-5). There is simply insufficient evidence to show that the cause of the flooding to Mr. Womack's basement resulted from a malfunction of the prevention device that was the fault of MSD. Rather, the preponderance of the evidence shows that debris that was improperly flushed caused the failure of the prevention device.

Therefore, the Court denies Mr. Womack's claim in this case.

IT IS SO ORDERED.

Date: 3/2/2012

Karen L. Litkovitz
Karen L. Litkovitz, Magistrate Judge
United States District Court